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12 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

13
14 RAMON IZQUIERDO, } Case No. 2:13-cv-01032-RBF-VCF
15 Plaintiff, }
16 vs. } REPLY MEMORANDUM OF
17 } POINTS AND AUTHORITIES IN
18 EASY LOANS CORPORATION; and } SUPPORT OF DEFENDANT'S
19 DOES 1-10, inclusive, } OBJECTION AND MOTION TO
20 Defendants. } STRIKE PLAINTIFF'S REPLY
21 } DECLARATION [DOC. NO. 37-1]
22 _____ }

1 **I. INTRODUCTION**

2 The one sentence in the Complaint filed by Plaintiff Ramon Izquierdo
 3 (“Izquierdo”) alleging the Account is a “debt” under the FDCPA¹ supplied no factual
 4 support – it simply parroted the language of the statute. In response to the
 5 interrogatory served by defendant Easy Loans Corporation (“Easy Loans”) asking
 6 Izquierdo to state all facts to support his allegation that the account is a “debt,” he
 7 provided none. At his deposition, he testified that he could not remember how or
 8 when he used the account. He submitted no evidence with his moving papers in
 9 support of summary judgment on this point.

10 The reply declaration (Doc. No. 37-1) is not “consistent” with his Complaint,
 11 nor does it merely clarify his deposition testimony. The testimony describing
 12 purchases he made and how he used the account is new evidence that was not
 13 provided while discovery was open. It directly contradicts his lack of memory at his
 14 deposition. As a result, his Reply declaration contains new evidence and it prejudices
 15 Easy Loans. It should not be considered.

16 **II. ARGUMENT**

17 **A. Izquierdo’s Testimony About How He Purportedly Used The
 18 Account Is New Evidence He Withheld In Discovery**

19 Izquierdo argues that his declaration describing the nature of charges on the
 20 account is not new evidence because it is “consistent” with his allegation in his
 21 Complaint and “merely provides clarification” of his deposition testimony. *See Doc.*
 22 No. 44 at 2:21-5:8. A review of Izquierdo’s discovery responses and deposition
 23 testimony shows he is incorrect.

24 In response to defendant Easy Loans Corporation’s (“Easy Loans”) written
 25 discovery, which asked him to state all facts he had to support his allegation that the
 26 account is a “debt” under the FDCPA, he stated:

27
 28 ¹ Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. (“FDCPA”).

1 Objection. Calls for a legal conclusion and is vague and ambiguous.
 2 Notwithstanding the foregoing objections, the Debt arose from services
 3 provided by a Creditor which were primarily for family, personal or household
 4 purposes.

5 *See Doc. No. 34-4 at Ex. H.* Then at his deposition he could not describe how or
 6 when he used the account. *See No. 34-3 at Ex. F, 19:18-20:6.* He did not clarify his
 7 testimony by amending his transcript, nor did he serve amended discovery responses.

8 With his opening papers in support of his summary judgment motion,
 9 Izquierdo did not submit any declaration. Instead, to meet his burden of proving the
 10 unpaid charges on the account were incurred “primarily for personal, family or
 11 household use,”² he relied solely on a one sentence allegation in the Complaint that
 12 merely quotes the language of the FDCPA. *See Doc. No. 33 at p. 7:17-19.*

13 The declaration submitted with his Reply is not “consistent” with the
 14 Complaint and does not merely “clarify” his deposition testimony. His new
 15 testimony offers paragraph after paragraph of new evidence that purportedly supports
 16 his claim that the account is a “debt” under the FDCPA. He now states that he used
 17 the account to “buy day to day necessities, food, clothes, gas, or other items for
 18 personal use” and the numerous other details about the account which were not
 19 included in his discovery responses and contradict his deposition testimony. *See*
 20 Doc. No. 37-1. These are details Izquierdo was required to provide in his discovery
 21 responses, or at his deposition, so that counsel for Easy Loans could subject them to
 22 cross-examination or otherwise follow up. At minimum, he should have supplied
 23 these details with his moving papers. He did not and cannot now use them to support
 24 his reply. *See Lindner v. Ford Motor Co., 2012 WL 3598269, *2 (D. Nev. Aug. 17,*
 25

26
 27 ² Izquierdo does not challenge that it is his burden to prove the account qualifies
 28 as a “debt.” *See 15 U.S.C. 1692a(6)* (defining the term “debt” as limited to obligations
 incurred “primarily for personal, family or household purposes”).

1 2012); *Pacquiao v. Mayweather*, 2010 WL 3271961, *1 (D. Nev. Aug. 13, 2010).³

2 **B. Easy Loans Did Not Have A Duty To Repeatedly Ask Izquierdo To
3 State Facts To Support His Allegation That The Account Is A Debt
Under The FDCPA**

4 Easy Loans was not under any “duty” to repeatedly ask him to state all the facts
5 showing the account is a “debt” under the FDCPA, until Izquierdo got around to
6 providing them, as he now suggests. *See Doc. No. 44 at 4:26-5:11.* It is his burden
7 on summary judgment to prove the unpaid charges on the account qualifies as a
8 “debt.” He failed to provide evidence in his discovery responses, or during his
9 deposition, and he never corrected his deposition testimony or amended his discovery
10 responses. He cannot offer new evidence in his reply papers which, if true, was
11 available to him when he filed his motion.

12 Relying on a decision from the Eastern District of Louisiana, *Sims v. Hughes*,
13 2013 WL 1352278, *1 (E.D. La. Apr. 2, 2013), Izquierdo argues that his deposition
14 testimony is not “legally binding” on the issue of whether the account qualifies as a
15 “debt.” *See Doc. No. 44 at 5:11-6:15.* He is wrong. In *Sims*, the plaintiff sued his
16 employer for negligence relating to a workplace injury plaintiff incurred while on the
17 job. *Sims*, 2013 WL 1352278, at *1. During his deposition, the plaintiff responded
18 “no” when asked if he believed the company’s personnel “did anything wrong.” The
19 court held his belief was not a judicial admission, and plaintiff was allowed to submit
20 other evidence to oppose summary judgment showing the company’s negligence even
21 if it was contrary to the plaintiff’s belief. *Id.*

22 *Sims* does not resemble this case. Izquierdo withheld evidence in discovery
23 about the nature of the charges on the Account, testified he could not remember how
24 the funds were used and then offered no evidence with his moving papers. His Reply
25

26 27 28 ³ Izquierdo attempts to distinguish *Lindner* and *Pacquiao* by arguing that the new
evidence at issue in those cases was documents rather than testimony. *See Doc. 44 at
3:10-21.* This is an irrelevant distinction. New evidence submitted with a reply brief
is improper regardless of whether it consists of documents or testimony.

1 declaration then offered new and contradictory evidence. *Sims* does not help him.⁴

2 **C. The New Evidence In Izquierdo's Reply Declaration Substantially
3 Prejudices Easy Loans**

4 Izquierdo's assertion that his new testimony about the nature of the charges on
5 the account is not "prejudicial" to Easy Loans is false. *See* Doc. No. 44 at 2:21-24.
6 By withholding facts requested in discovery, Izquierdo deprived Easy Loans from
7 conducting follow up discovery to cross-examine him about the basis for the claims.
8 Further, by failing to submit this evidence with its moving papers, Izquierdo deprived
9 Easy Loans of a chance to respond. This is precisely why courts in this District have
10 struck evidence offered in support of a reply brief that was available to the moving
11 party when they moved for summary judgment. *See Lindner*, 2012 WL 3598269, *2;
12 *Pacquiao*, 2010 WL 3271961, *1.

13 The purported facts about how Izquierdo used his account are facts that were
14 available to him through out this litigation. He has no excuse for withholding this
15 information. The Reply declaration should be stricken.

16 **III. CONCLUSION**

17 For the reasons stated in Easy Loans' motion to strike and herein, Easy Loans
18 respectfully requests that the Court enter an Order striking the Declaration of Ramon
19 Izquierdo (Doc. No. 37-1) and all portions of the Reply (Doc. No. 37) that rely on it.

21 ⁴ Further, courts have routinely held that when FDCPA plaintiffs fail to provide
22 facts showing the account is a "debt" or testify they cannot remember how the account
23 was used, summary judgment for the defendant is appropriate. *See, e.g., Matin v.*
24 *Fulton, Friedman & Gullace LLP*, 2011 WL 5925019, **4-5 (E.D. Pa. Nov. 14, 2011)
25 (summary judgment for defendant because no evidence credit card account was a "debt"
26 under the FDCPA; plaintiff testified at her deposition that she could not remember
27 charges on the card); *Toroussian v. Asset Acceptance, LLC*, 2013 WL 5524831, *6 (C.D.
28 Cal. Oct. 4, 2013) (summary judgment for defendant on FDCPA claim; plaintiff did not
provide evidence that alleged fraudulent credit card charges qualified as a "debt");
Anderson v. AFNI, Inc., 2011 WL 1808779, *14 (E.D. Pa. May 11, 2011) (same; victim
of ID theft could not prove existence of "debt").

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